RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

WOOD v. DETROIT CITY RAILWAY CO.

Where a party drives his vehicle upon a street car track, without looking to see whether a car is coming, and then refuses to get out of the way, though there is ample opportunity to do so, he is guilty of such negligence as to prevent his recovery in an action on the case for the negligence of the driver.

If the action were trespass, it might become necessary to decide whether or not the injury was purposely inflicted; but if it was, the car company would not be liable for the wilful trespass of the driver.

ERROR to Wayne.

John G. Hawley, for plaintiff and appellant.

John C. Donnelly, for defendant.

COOLEY, C. J.—This is an action for personal injuries alleged to have been caused by the driver of the defendant negligently causing his car to run against the vehicle of the plaintiff as he was driving along one of the streets of Detroit. The plaintiff was sworn as a witness in his own behalf, and he also called the driver as his witness. After hearing both stories, the Circuit Judge ruled that there was nothing to go to the jury, and directed a verdict for the defendant. The plaintiff brings error.

According to the plaintiff's story he was driving a one-horse vehicle along the street on one side of the defendant's track, when he encountered obstructions and turned towards the tracks, so that his right-hand wheels were over the rails. He did not look behind him to see if a car was coming until he felt something strike the rear wheel. He then looked around and saw it was the street car, and the driver, as he says, "motioned me with one hand to go on, or he would knock a wheel off me. I laughed at him and said, 'You had better not knock off more than one or two of them, or somebody will have to pay for them.' He kept on motioning to get out of the way. I told him I could not get over those wagons, and I was not going to try, but I would get out of his way just as soon as ever I could. I kept on. There was a number of wagons standing on the other side of the street, loaded with brick, and three, or four, or five of them with the rear ends of the wagons out

on the street further than the fore end, which brought the rear end of these wagons very near the car track, so that I had to get with the wheels on the right-hand side of my wagon partially on to the track, and some places it got off the track, and some places I had to get right out pretty well over the track." Up to this point the plaintiff was not only in fault, but he was the only party in fault. He had driven upon the track in front of an approaching car, without looking around until the car had come into collision with his vehicle. This was gross carelessness on his part. But further on his evidence shows that the other side of the track was entirely unobstructed, and that there was nothing to prevent his crossing at once and allowing the street car to proceed on its way. The car had come to a standstill on the first collision, and the plaintiff's conduct in maintaining his ground, and responding to the driver's request that he should get out of the way by a laugh and a threat, was not only a wrong to the defendant, but also to any persons who might then be riding in the car or awaiting its coming.

But the plaintiff further testified that as he was leaving the track the driver called out, "God damn you, I can smash you anyhow," and that he let go the brake and the car almost instantly struck the plaintiff's wagon and threw it over, inflicting the injury complained of. The inference from this might be that the driver purposely, and in the anger excited by their altercation, ran his car against the plaintiff's wagon; and, if the action had been brought for the trespass, it might become necessary to decide whether, under cases like *Wright* v. *Wilcox*, 19 Wend. 343, the defendant would be responsible. In that case it was decided that where the servant wilfully drove his master's conveyance over a third person and injured him, the trespass was that of the servant, for which the master was not liable. The case was followed in *Richmond, &c., Turnpike Co.* v. *Vanderbilt*, 1 Hill 480; s. c. in error, 2 N. Y. 479, where the master of a vessel had purposely run the vessel into another; and in *Illinois Cent. Railroad Co.* v. *Downey*, 18 Ill. 259, where the engineer upon a railroad purposely ran his engine over live stock. Also, in *DeCamp* v. *Railroad Co.*, 12 Iowa 348, and many other cases.

The general principle, that the master is not liable for his servant's trespasses, is familiar, and was recognised by this court in *Chicago, &c., Railroad Co.* v. *Bayfield*, 37 Mich. 205. And if

it were important to determine whether the injury was one purposely inflicted, and not one resulting from carelessness, the question would no doubt be one to be submitted to the jury: *Rounds* v. *Delaware, &c., Railroad Co.*, 64 N. Y. 129. But this is an action in case, and the ground on which it is sought to charge the defendant is, that its servant negligently drove the car against the plaintiff's vehicle. We are then to see whether, if negligence on the part of the driver is made out, or there is any evidence tending to prove it, the plaintiff himself, on his evidence, does not appear to have been at least equally negligent. And we think he does. He knew very well he was in the driver's way, and he had ample time and opportunity to get out of danger if so disposed. That he was not disposed to allow the car to go on until it suited his pleasure to do so, is quite apparent; and there is abundant reason in his evidence for believing that he was purposely annoying the driver and delaying the car. If so he cannot complain of the consequences.

The driver's testimony is quite different from the plaintiff's. He testified that when he first signalled the plaintiff to get off the track, the plaintiff made no effort to do so. The driver told him to get off or he would be run into, and he replied, run, and be damned; he had as much right to the track as the driver had, and would get off when he pleased. He drove right along on the track, looking back and scolding the driver. Finally he turned off and the car moved on, but he almost immediately turned again towards the track sufficiently to be struck by the car. If this evidence is true the contributory negligence of the plaintiff was plain and very gross, and he must bear the consequences. Whether, therefore, we believe the plaintiff or the driver, the ruling of the circuit judge was well warranted.

The judgment must be affirmed with costs.

The other justices concurred.

There can be no doubt as to the correctness of the decision in the principal case. As respects the liability of the principal for the wilful trespass of the agent, referred to by the court in the principal case, there may, however, well exist some difference of opinion. The rule is generally stated to be, that a master is not answerable for the wilful and malicious act of his servant. It was so held in the leading cases of *McManus* v. *Crickett*, 1 East 106, and *Wright* v. *Wilcox*, 19 Wend. 343, and these cases have been followed in many subsequent cases: *Richmond Turnpike Co.* v. *Vanderbilt*, 1 Hill 480; s. c. 2 N. Y. 482; *Isaacs* v. *Third Ave. Railroad Co.*, 47 Id. 122; *Repsher* v.

Wattson, 17 Penn. St. 369; *Harris* v. *Nicholas*, 5 Munf. 483; *Brown* v. *Purviance*, 2 Har. & G. 316; *Wallace* v. *Finberg*, 46 Tex. 37; *Ill. Cent. Railroad Co.* v. *Downey*, 18 Ill. 259; *De Camp* v. *Miss., &c., Railroad Co.*, 12 Iowa 348. See, also, Evans on Agency *480; Story on Agency, sect. 456, and the cases there cited.

McManus v. *Crickett* was an action of trespass, in which it appeared that the servant of the defendant wilfully drove his master's carriage against the carriage of the plaintiff, the defendant not being present nor in any manner directing or assenting to the act of the servant.

In *Wright* v. *Wilcox* the action was in case against both master and servant for the wilful act of the servant in driving over a boy with his master's wagon while in his master's employment. In both cases it was held that the master was not liable.

The doctrine of these cases has, however, been more than once controverted. Judge REEVE, in his work on Domestic Relations 358–360, and Judge REDFIELD, in his work on Railways (vol. 1, sect. 130, note), attack the principle of these cases with their accustomed vigor and ability. Judge REDFIELD contends that the principle that a master is not liable for the wilful wrong of his servant, is not applicable to the case of corporations, and, especially, such as railways: Redf. on Railroads, sect. 130, citing *Edwards* v. *The Union Bank*, 1 Fla. 136; *Whiteman* v. *Wilmington, &c., Railway*, 2 Harr. 514. (See, also, Cooley on Torts 534; *New Orleans, &c., Railroad Co.* v. *Allbritton*, 38 Miss. 277; *Carker* v. *C. & N. W. Railway Co.*, 36 Wis. 657, where a railway company was held liable to pay the sum of $1000 damages for the conductor's kissing a female passenger against her will.) In a note to the same section, too long to be quoted in its entirety, he says: It has always seemed to us that the whole class of cases which hold that the master is not liable for the wilful acts of his servant, has grown up under a misinterpretation of the case of *McManus* v. *Crickett*, 1 East 106, for they all profess to base themselves upon that case. That case, we apprehend, was never intended to decide more than that the master is not liable in trespass for the wilful act of the servant. Lord KENYON, C. J., in delivering his opinion in that case, with which the court concur, expressly says, speaking of actions on the case, brought against the master, where the servant negligently did a wrong in the course of his employment for the master: "The form of these actions shows that where the servant is in point of law a trespasser, the master is not liable as such, though liable to make compensation for the damage consequential from his employing of an unskilful or negligent servant. The act of the master is the employment of the servant. This reasoning certainly applies with the same force to that class of cases where the act of the servant is both direct and wilful, as where it is only negligent. The master is not liable in either case, perhaps, so much for having impliedly authorized the act, as for having employed an unfaithful servant, who did the injury in the course of his employment. And whether done negligently or wilfully, seems to be of no possible moment, as to the liability of the master, the only inquiry being whether it was done in the course of the servant's employment. And the argument that, where the servant acts wilfully, he *ipso facto* leaves the employment of the master, and, if he is driving a coach-and-six or a locomotive and train of cars, thereby acquires a special property in the things, and is *pro hac vice* the owner and doing his own business, may sound plausible enough, perhaps, but we confess it seems to us unsound, although gathered from so ancient a date as Rolle's Abridgment,

and adopted by so distinguished a judge as Lord KENYON. The truth is the whole argument is only a specious fallacy; and whether Lord KENYON intended really to say that no action will lie against the master in such case, or only to say, what the case required, that the master is not liable in trespass, it is very obvious the proper distinction in regard to the master's liability, cannot be made to depend upon the question of the *intention* of the servant. The master has nothing to do either way with the purpose and intention of his servants. It is with their acts that he is to be affected; and, if these come within the range of their employment, the master is liable, whether the act be a misfeasance or a non-feasance, an omission or commission, carelessly or purposely done." See the note above quoted from and the cases there cited, for a further discussion of this question.

With reference to the general subject, Judge COOLEY, in his work on Torts 535–6, makes the following observations: "The liability of the master for intentional acts which constitute legal wrongs, can only arise when that which is done is within the real or apparent scope of the master's business. It does not follow where the servant has stepped aside from his employment to create a tort which the master has neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do. * * * In determining whether or not the master shall be held responsible, the motive of the servant in committing the act is important, for if he supposes he is acting in furtherance of the master's interest, under a discretionary authority which the master has conferred upon him, the case will generally have an aspect quite different from what it would present if it was manifest that malice were being indulged irrespective of the master's interest. But the motive is not conclusive. A man may purposely defraud another in selling his master's goods, that he may gratify his private malice against the purchaser; but if the master had empowered him to make the sale, he must take the responsibility of any wrong committed in making it. The test of the master's responsibility is not the motive of the servant, but whether that which he did was something his employer contemplated, and something which, if he should do it lawfully, he might do in his master's name." See the cases collected and considered in the notes of the learned author above quoted.

In *Howe* v. *Newmarch*, 12 Allen 49, the case of *McManus* v. *Crickett* is criticised, and the rule laid down by HOAR, J., that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by the master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."

In *Mott* v. *Consumers' Ice Co.*, 73 N. Y. 543, the rule is laid down as follows, ALLEN, J., delivering the opinion of the court: "For the acts of the servant within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly or even wilfully. In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them. * * * But if a servant goes outside of

his employment, and without regard to his services, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible; so that the inquiry is whether the wrongful act is in the course of the employment, or outside of it, and to accomplish a purpose foreign to it. In the latter case the relation of master and servant does not exist so as to hold the master for the act." See, also, *Rounds* v. *Del., Lack. & West. Railroad Co.*, 64 N. Y. 129.

In a note to sect. 456, of Story on Agency, already referred to, the editor says: "If the act of the servant was wilful and intentional, still if it was done with the intention of furthering the object of his employment, and was not a manifest departure from the general line of his duty, then, according to the weight of authority, the master will be liable. In either case supposed, it would be no defence to prove that the master had expressly forbidden the act." Citing *Limpus* v. *London, &c., Omnibus Co.*, 1 H. & C. 526; *Howe* v. *Newmarch*, 12 Allen 49; *Betts* v. *De Vitre*, L. R., 3 Ch. App. 441; *Whatman* v. *Pearson*, L. R., 3 C. P. 422; *Philadelphia, &c., Railroad Co.* v. *Derby*, 14 How. 468; *Garretzen* v. *Duenckel*, 50 Mo. 104; *Bryant* v. *Rich*, 106 Mass. 180; *Passenger, &c., Railroad Co.* v. *Young*, 21 Ohio St. 518; *Sherley* v. *Billings*, 8 Bush (Ky.) 147; *Bayley* v. *Manchester, &c., Railway Co.*, L. R., 7 C. P. 415; *The Thetis*, L. R., 2 Adm. & E. 365; *Ramsden* v. *Boston, &c., Railroad Co.*, 104 Mass. 117; *Isaacs* v. *Third Ave. Railroad Co.*, 47 N. Y. 122; *Higgins* v. *Watervliet Turnpike, &c., Co.*, 46 N. Y. 23; *Goddard* v. *Gd. Trunk Railway Co.*, 57 Me. 202.

In Underhill on Torts (Moak's ed.), ch. iii., sub-rule 2, p. 35, the rule is thus stated: "A master is responsible for the manner in which his servant does an act for the master's benefit, which act is within the scope of his probable authority, even though such manner was contrary to the master's orders; but a master is not responsible for an act of his servant which is in itself, and not merely in the manner of doing it, illegal."

Authorities upon the question under consideration might be multiplied, but the foregoing citations will enable the reader to understand the drift of modern authority upon this important question, from which, we think, it must be apparent that, if the court, in *McManus* v. *Crickett*, intended to decide that a master is not liable in any form of action for any wilful or malicious act of his servant, this rule has, according to the weight of authority, been considerably modified and placed upon a more satisfactory and reasonable basis. Whether the liability of the master according to the authorities above cited is yet coextensive with the demands of justice in cases, may perhaps be open to question, but the more modern rule upon the subject is certainly a great advance upon that laid down in some of the older cases.

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